Free Speech, Social Networking, and School Liability
2012 Policies and Cases

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Social Networking and School Liability
IQ Test

1. Student misconduct: "F******* is one of those ******** words . . ."

   Educator response: expulsion

   Valid policy? Y_____ N_____ D_____

2. Student misconduct: Facebook fight to physical fight

   Educator response: no action taken

   Valid policy? Y_____ N_____

3. Student misconduct: schoolyard fight to Facebook spat

   Educator response: six students were suspended, out of approximately thirty arguing online

   Valid policy? Y_____ N_____

4. Student misconduct: those three Facebook messages

   Educator response: require student login information for Facebook and for email

   Valid policy? Y_____ N_____

5. Student misconduct: the fake Facebook profile of a special needs student

   Educator response: SRO cooperated with local police investigation

   Valid policy? Y_____ N_____

Social Networking and School Liability
Court Rulings

A. Students Mistreat Each Other

1. What educators cannot do: *J.C. v. Beverly Hills*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010)

On Tuesday, May 27, 2008, student J.C. posted a YouTube video of several classmates criticizing a fellow student. It showed them in a restaurant, describing student C.C. as a "slut," "spoiled," and "the ugliest piece of **** I've ever seen in my whole life"—among other profane and lewd slurs. J.C. not only encouraged five to ten students to view the video. She also told C.C. about it. At school the next day, C.C. heard about ten students discussing the video. When C.C. and her mother met with a school counselor, C.C. shared that she had experienced both "humiliation" and "hurt feelings." She missed the rest of her classes that day. School administrators viewed the video on campus, interviewed students, and required written statements. Then they told J.C.—who was previously suspended for surreptitiously filming teachers on campus and posting those videos online—to delete this video. Theoretically, it was possible that students could have viewed this video on campus, via their cell phones. To educators' knowledge, however, it had only been seen on campus during their investigation.

The court found that J.C. had a First Amendment right to post the video without school discipline. It was created off-campus, during non-school hours. Further, the video did not cause a material and substantial disruption on campus—and there were not "specific facts that might reasonably lead school officials to forecast disruption." While acknowledging that educators have a "duty to teach norms of civility," by regulating lewd or offensive speech, this authority does not extend to off-campus student speech. In order to discipline student expression, educators must show that their actions were "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

2. What educators can do: *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011)

After high school senior Kara arrived at home on December 1, 2005, she created a MySpace.com group called "S.A.S.H." She told the court that this stood for "Students Against Sluts Herpes." Ray, another student, said that it meant "Students Against Shay's Herpes." Under this headline, Kara wrote "No No Herpes, We don't want no herpes." She invited approximately 100 MySpace friends to join this group; about two dozen students from her high school ultimately joined, including Ray. He uploaded a picture of himself and another student holding their noses, with a sign. It said, "Shay Has Herpes." Kara responded: "Ray you are soo funny!=)" and "the best picture [I]'ve seen on myspace so far!!!!" Later uploads by Ray included an image of Shay with the caption, "portrait of a whore." For creating a "hate website" that violated the school's policy against "harassment, bullying, and intimidation," Kara was given a ten day suspension from school. She received a ninety day social suspension, which limited the school events she could attend. She was also barred from cheerleading and, though she was the current "Queen of Charm," she was blocked from crowning the incoming queen.

The court upheld the school's discipline of Kara because her online speech caused a material and substantial disruption on campus. Thus, the school could discipline under a *Tinker* analysis. *Compare Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969). The court here wrote that "where such speech has a *sufficient nexus with the school*, the Constitution is not written to hinder school administrators' good faith efforts to address the problem" (emphasis added).

3. The bottom line

When students speak off-campus, start by thinking through that misconduct as if the student spoke verbally, rather than as if the student posted content online. To discipline students for off-campus speech, educators must prove a material and substantial disruption on campus. Without that disruption, even if the student acted contrary to norms of civility, educators cannot regulate the student's speech.

B. Students Discuss School-Sponsored Events

1. What educators can do: *Doninger v. Niehoff,* 527 F.3d 41 (2d Cir. 2008)

Connecticut students were planning their annual Jamfest, a battle-of-the-bands concert organized by the Student Council in cooperation with the school. The 2007 Jamfest was delayed twice. When council members were told that a third change was needed, they worried that the Jamfest either would not occur or that bands would drop out. Four Student Council members, including Avery, accessed a school computer to send a mass email from a parent's email account. The email urged recipients to contact the district superintendent, Schwartz, and to ask her to hold Jamfest as scheduled. A flood of concern community members contacted Schwartz and Niehoff, the school principal. In a hallway conversation, Niehoff told Avery that she was disappointed the students sent a mass email, rather than working with their faculty advisor and school administrators. She reminded Avery that Student Council members must "demonstrat[e] qualities of good citizenship at all times." Off campus, Avery posted a LiveJournal.com blog, which encouraged people to contact Niehoff. Avery gave ideas for people who "want[ed] to write something or call her to p*** her off more." The school suspended her for the posting.

The court upheld the school's disciplinary decision. Even though this was off-campus speech, it created a foreseeable risk of an on-campus material and substantial disruption. The court emphasized the nature of Student Council participation, writing that "participation in voluntary, extracurricular activities is a 'privilege' that can be rescinded when students fail to comply with the obligations inherent in the activities themselves." In this context, regulating speech on the basis of values was permissible. As the court wrote, "Avery's posting—in which she called school administrators 'douchebags' and encouraged others to contact Schwartz 'to p*** her off more'—contained the sort of language that properly may be prohibited in schools."

2. The bottom line

Educators can regulate student speech pertaining to school-sponsored events, when it creates a foreseeable risk of substantial disruption in the school and when student obligations are inherent in a school-sponsored extracurricular activity.

C. Students Criticize Educators

1. What educators can do: *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002)

Eight grade student J.S. created a website with this caption: "Teacher Sux." When visited entered the website, they had to agree to a disclaimer, which said in part that they would neither notify school district employees about the site nor cause trouble for the website creator. Through profane and threatening commentary, animation, and sound clips, the website went on to criticize J.S.'s algebra teacher. It detailed reasons for why the teacher should die, solicited donations to hire a hitman, and featured a bloody illustration of the teacher with her head removed, among other things. Because the principal believed the threats were serious, he contacted local police, who declined to file charges. He also notified the teacher, who lost weight, experienced short term memory loss, could no longer handle crowds, went on anti-anxiety/anti-depressant medication, and received medical leave for the remainder of the year. The principal also testified that the school was demoralized—from students to school staff—worse than anything he had seen in forty years as an educator. The school expelled J.S.

The court upheld the expulsion. Educators can "prohibit speech and punish a student for speech, if the school sustains its burden of establishing that the student speech materially disrupts class work, creates substantial disorder, invades the rights of others or it is reasonably foreseeable that the speech will do so." Also, it offered several factors to consider, in determining whether a student's threat is a "true threat." These include (1) how the recipient and others react, (2) whether there was a conditional element to the threat, (3) whether the student make similar threats to the victim at other times, and (4) whether the victim reasonably believed the student had a propensity for violence. The court further noted that "[s]chools are given the monumental charge of molding our children into responsible and knowledgeable citizens."

2. What educators cannot do: *J.S. v. Blue Mountain School District*, 650 F.3d 915 (2011)

J.S. created a fake and sexually explicit MySpace page that featured her middle school principal. It depicted him as a principal named "M-Hoe" and listed his general interests as "detention, being a tight *** . . . f******* in my office, hitting on students and their parents." In the profile section, J.S. wrote in part, "I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me." J.S. testified that she found this "comical" because it was "outrageous." When students at school told J.S. that they found the MySpace page amusing, she made it "private" so that only selected friends who view it. The principal was told about the profile, and after some difficulty in locating it, disciplined J.S. for making a false accusation against school staff. Later, he admitted that he believed students "weren't accusing me. They

were pretending they were me." There were "rumblings" in the school about this MySpace profile, as teachers and students discussed it, including one time when a teacher had to raise his voice to make students refocus on their math class. J.S. was suspended by the school.

The court overturned J.S.'s suspension because it found no substantial disruption and no reasonable likelihood of one. To punish speech that is off-campus, not school-sponsored, and not at a school-sponsored event, the school would have needed to show a substantial disruption. In addition, the nature of the online speech was important: "The profile was so outrageous that no one could have taken it seriously, and no one did." One judge's concurring opinion made it clear that the court both disagreed with what the student said and would protect the student's right to say it: "courts have long disclaimed the ability to draw a principled distinction between 'worthless' and 'valuable' speech. We must tolerate thoughtless speech like J.S.'s in order to provide adequate breathing room for valuable, robust speech—the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination."

3. The bottom line

When a student criticizes educators, the school should look for substantial disruption caused by the student's own expression, rather than by educators drawing attention to it.

D. Additional Cases for Comparison

1. *Beussink v. Woodland R-IV School District*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (granting preliminary injunctive relief to student who created a vulgar website criticizing his high school).

2. *Emmett v. Kent School District Number 415*, 92 F. Supp. 2d 1088 (W.D. Wa. 2000) (finding that student had a substantial likelihood of prevailing in claims against school when he was disciplined for website with mock obituaries of his friends, and with mock votes for who would be the next to "die" and thus be the subject of the next obituary).

3. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (2002) (granting summary judgment in favor of student who created a website containing a list of "people I wish would die," among other concerning content).

4. *Requa v. Kent School District Number 415*, 492 F. Supp. 2d 1272 (W.D. Wa. 2007) (upholding discipline of a student who secretly filmed a teacher during class, while someone held a vulgar pose behind the teacher, and then posted the video online).

5. *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (holding that a student could not be disciplined for creating a non-disruptive, non-vulgar Facebook group that criticized a teacher).